Supreme Court, U.S.
FILED
MAR 28 1999
CLERK

No. 98-1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES S. ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a corporate officer (who is also an employee of the corporation) may claim the protection of the Fourth Amendment against the unreasonable search of an office in which he was physically located at his place of business during an extended holiday weekend when the offices were closed to the general public, no other employees or third parties were present, all exterior doors were locked, and although the office was not the employee's regularly assigned workspace, it was located in close proximity to the employee's office and the employee clearly undertook actions to exclude all other persons from that office?

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STATEMENT OF THE PROCEEDINGS

A federal grand jury sitting in the Western District of Oklahoma named Respondent in a three-count indictment alleging violations of the child pornography statutes.[1] The indictment was the culmination of an undercover reverse sting operation conducted by the Federal Bureau of Investigation in Oklahoma City, Oklahoma.[2] Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, Respondent filed a pre-trial motion to suppress a confession and a warrantless seizure of evidence from his place of employment at the time of his arrest.[3] Following a hearing before the district court,[4] evidence seized from Respondent's place of employment and the confession were ordered suppressed.[5]

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1. Respondent is accused of knowingly receiving and distributing child pornography on the Internet [Title 18, United States Code, Section 2252(a)(2)(b)] and two counts of knowingly transporting and shipping child pornography [Title 18, United States Code, Section 2252(a)(1)].

2. Respondent, communicating with individuals in various cities in this country via the Internet, was a resident of the Atlanta, Georgia area.

3. *Inter alia*, Respondent filed a pre-trial notice of intent to assert insanity at the time of the offense pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure.

4. References to the transcript of that proceeding are denominated by the citation "Tr."

5. At the time arresting agents illegally entered Respondent's place of employment, they physically possessed a search warrant for Respondent's home. Following his arrest, Respondent was driven by the arresting agents to his home. Execution of that warrant at the residence resulted in the seizure of numerous computer disks containing child pornography and the overheard conversation of Respondent stating to his wife that child pornography would be found on his home computer. The district court denied a motion to suppress the items seized from the home and the statement overheard by the agents. In the suppression order, the district court opined that the agents may have had sufficient information to obtain a search warrant for the office when they requested the warrant for the house. (Pet. App. 35a, fn. 6)

Petitioner appealed the suppression order to the Tenth Circuit Court of Appeals, where the district court was affirmed.

STATEMENT OF THE CASE

During the 1996 Fourth of July weekend, Respondent was employed as the corporate vice-president of research and development for A.D.T. Corporation, a manufacturing company in Atlanta, Georgia.[6] Respondent possessed a key for gaining entrance to the building and had on-going corporate permission to be in that building as he desired. On the day of his arrest, Respondent went to the corporate offices where he had an individual office.[7] Respondent entered using a key card. Once inside the building, the outside door automatically locked behind him. The facility was empty of any other employees or third parties. (Tr. 8)

Shortly after entering the office building, Respondent was arrested in Room 222.

> Room 222 had a single door and it had two windows. One of the windows was closed with a combination of venetian blinds and curtains. The second window was closed by curtains only. The second window that was closed by curtains was a narrow tall window. (Tr. 9)[8]

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6. As vice president of research and development, Respondent was responsible for the "development of new products, new technologies, and the support of existing products and technologies." (Tr. 6)

7. The arrest took place on the Saturday of a four day holiday weekend. The offices were closed at that time to the public. Respondent's personal office was located on the second floor in Suite 218. A chart of the A.D.T. offices was identified during the suppression hearing. When asked if he had "open permission" to be in the building whenever he needed, Respondent replied that as "an officer of the company, I have the right to be there." (Tr. 12)

8. Room 222 was located on the same floor as Respondent's office and was situated down a short hallway on the other side of a conference room.

Respondent also placed a towel over the draperies to prevent any third-party from looking into the room. (Tr. 10-11) The door to Room 222 was "personally" closed by Respondent. Respondent felt that he had an expectation of privacy in Room 222 that morning. (Tr. 11) Respondent had a card key for the entire premises and possessed a master key that allowed him entry into any locked office except the president's office. Company policy permitted Respondent as a corporate officer to enter any area of the office "[o]n a matter of need." (Tr. 13) Room 222 was a vacant room which had "no use at all." *Id.*[9] Company policy allowed Respondent to be in the corporate building for "purposes which I felt as an officer of the company were appropriate." *Id.*

In order to support the warrantless entry and seizure of evidence, Petitioner presented the testimony of Oklahoma City F.B.I. Case Agent Joseph Bradley. On July 5, 1996, while located in Atlanta, Bradley obtained a federal search warrant for Respondent's residence. Agents deployed a "reverse sting" and arranged for blank video tapes supposedly containing child pornography to be sent to Respondent by a cooperating individual located in Oklahoma. Due to a logistics problem, a scheduled controlled delivery of the blank video tapes was delayed until July 6th, a Saturday. Surveillance was resumed on Saturday and Respondent was seen driving from his home to the Mail Box, Etc. location to claim his package.[10] The agents anticipated that he would proceed to his residence; instead, agents followed Respondent to the A.D.T. Corporation offices and observed Respondent enter the facility. (Tr. 29; 30)[11] Agent Bradley repeatedly

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9. Although having no specific purpose, Room 222 was selected by Respondent that morning as the location to utilize a company-owned television cart, television, and video-recorder to view the tapes. At the time of his arrest, Room 222 was specifically used by Respondent as a haven of privacy in his corporate office work space.

10. At the time Respondent picked up the package, the agents physically possessed a federal search warrant for Respondent's home.

11. Although not knowing if Respondent used a key to enter the building, none of the agents reported to Bradley as the case agent that (Cont'd)

knocked on the door but received no answer. The agents activated a siren on a bureau car in the parking lot to which there was again no response.[12] A decision was made to enter the building "through the front door" and three agents including Bradley entered the second floor of the facility.[13] Neither Bradley nor the other agents located Respondent during their first sweep of the building. Retracing their steps, Bradley saw a light emanating from under a closed door "so I went right in the room." (Tr. 33) When he approached the room, the door was closed. A narrow window next

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(Cont'd)

they found any evidence of illegal entry into the corporate offices. Based upon Agent Bradley's own observations, "there did not appear to be any illegal entry [by Anderson]." (Tr. 55; 56)

12. Petitioner makes no attempt to argue that exigent circumstances existed for the warrantless break-in by arresting agents. The Sixth Circuit, in agreement with the district court, found exigent circumstances to have been particularly lacking. (Pet. App. 18a) "As an additional matter, we are concerned with the potential for government manipulation under the facts of this case." (Pet. App. 19a)

13. The district court inquired if the front door was unlocked. Agent Bradley acknowledged that the door was locked. When asked how entry was gained to the building, Agent Bradley stated "I retracted the dead bolt." (Tr. 32) On cross-examination, Agent Bradley was simply unable to admit that the agents gained access into the A.D.T. offices through forced entry:

> Q. And I believe your testimony was that you retracted the dead bolt?
>
> A. Yes, sir . . . I used my knife to retract the dead bolt and open the door.
>
> Q. In other words, you broke in, all intensive [sic] purposes you broke in?
>
> A. I used my knife to retract the lock, and I opened the door.

(Tr. 63-64)

to the door had a towel placed over it from the inside of the room. Bradley's view into the room was obstructed and observation into the room was difficult. When he first opened the door, Bradley was not sure if Respondent was in the room. Upon entering the room, Bradley discovered Respondent sitting in a chair. The only items in the room were a cart holding a television and VCR, the box containing the controlled delivery video tapes, and a video tape in the machine.[14] The room was otherwise empty and no name appeared on the door.[15] At that point, Agent Bradley identified himself and placed Respondent under arrest. The agents seized the controlled delivery video tapes, computer related items from Respondent's office, computer disks containing child pornography, and obtained a confession from Respondent.

REASONS FOR DENYING THE WRIT

As detailed below, there is no cause for this Court to review the fact-bound contentions of Petitioner which have now been rejected by the district court, a panel of the Tenth Circuit Court of Appeals, and the refusal of the *en banc* appellate court to grant relief. The court of appeals' decision is correct, does not improperly expand the ability of an employee to claim the protection of the Fourth Amendment in his workplace, and does not depart from the analysis employed by other courts of appeals or the recent pronouncement of this Court in *Minnesota v. Carter*, __ U.S. __, 119 S. Ct. 469 (1998).

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14. When questioned, Respondent told Bradley that the VCR and chair had been obtained from an adjacent conference room. (Tr. 35)

15. Subsequent to the date of Respondent's arrest, Bradley interviewed the president of A.D.T. Corporation, William Ragland. Ragland told Bradley that the room in which Respondent was arrested was not used for any particular reason but that it was a room "where Respondent would have felt quite safe there . . . so that if he was going to go to that part of the building to view child pornography, that he would feel safe there." (Tr. 71; 72)

I.

RESPONDENT ADEQUATELY ESTABLISHED A FOURTH AMENDMENT RIGHT OF PRIVACY

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The extent to which the Fourth Amendment protects people "may depend upon where those people are." *Minnesota v. Carter*, __ U.S. __, 119 S. Ct. 469, 473 (1998). The capacity of an individual to claim Fourth Amendment protection is dependent upon whether the person claiming that protection of the Amendment has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).

> [I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable, i.e., one which has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, *supra*, at 472 (1998).

Property utilized for commercial purposes has been distinguished from and given different treatment for Fourth Amendment purposes than residential properties.[16] This Court has mandated that "in some circumstances, a worker can claim Fourth Amendment protection over his own workplace." *Minnesota v. Carter*, *supra*, at 474, citing, *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).[17]

It has been the consistent position of Petitioner in this case that Respondent has no legitimate expectation of privacy in Room 222 because he cannot show a "business nexus" to the premises searched.[18] Indeed, the cases cited by Petitioner both before the court of appeals and this Court involve the expectation of privacy of a worker in the workplace.[19] None of the cases cited by Petitioner, however, are similar to the particularized factual locus framing the issues in this case. Petitioner admits as much.[20]

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16. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

17. In assessing whether the defendants in *Carter* could claim Fourth Amendment protections, this Court focused on the significance of the connection between the defendants and the location searched. *Id.*

18. Actually, Petitioner couched its arguments in the district court and the court of appeals in terms of Respondent being unable to establish "standing" to raise a Fourth Amendment violation.

19. Petitioner recognizes that courts of appeals

> have generally held that individuals can claim the protection of the Fourth Amendment in those workplace areas with which they have a sufficient connection to give rise to a socially recognized privacy expectation . . .

[Pet. Br. at 9]

20. "These cases have arisen in context that in some respects differ from the facts here." [Pet. Br. at 10. fn 3]

The Tenth Circuit had little difficulty concluding that Respondent had a subjective expectation of privacy in Room 222.[21] The court of appeals recognized, however, that the primary focus of the issue was not Respondent's subjective expectation of privacy but whether that expectation of privacy in the area searched was reasonable under the circumstances.[22] Focusing on the significance of the connection of Respondent to Room 222,[23] the court of appeals acknowledged that in the "great variety of work environments . . . the question whether an employee has a reasonable expectation of privacy [in his work area] must be addressed on a case-by-case basis." [citing, *O'Connor v. Ortega*, *supra*, at U.S. 718.] (Pet. App. 7a) The court of appeals endorsed the "business nexus" test to the extent that an employee enjoys a reasonable expectation of privacy in "his workspace." "Business nexus" was not viewed to be a panacea in this case:

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21. Anderson entered the ATD office building during a holiday weekend and there were no other employees in the building. He used his corporate key card to enter the building and the door locked behind him. Once he was inside Room 222, he closed the door. The blinds and curtains were closed over one window, the curtains were closed over the sidelight window, and Anderson had attached a towel over the sidelight window curtains to further block any view into the room. Clearly he believed he would be alone and left undisturbed. Accordingly, we conclude Anderson had a subjective expectation of privacy in Room 222.

(Pet. App. 7a).

22. Within the workplace this Court has recognized that in a private (as opposed to a government) office, a defendant could expect he would not be disturbed in the workplace except by personal business invitees and personal effects would not be taken except with his permission or the permission of his supervisors. *See O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

23. "Therefore, we must determine to what extent an employee has standing to challenge the search of an area in his workplace that is not his office." (Pet. App. 8a)

> However, we do not believe the fact that a defendant does or does not work in a particular area should categorically control his ability to challenge a warrantless search of that area. Instead, the better approach is to examine all of the circumstances of the working environment and the relevant search.[24]

The Tenth Circuit looked to additional factors.[25] The court gave weight to the personal nature of the items seized from Respondent (Pet. App. 10a); ownership, lawful possession, or lawful control of the property or place searched (Pet. App. 11a); the immediacy of control over items seized "regardless of the business connection he may or may not have to the room where the items are found" (Pet. App. 13a); and the physical presence of Respondent at the time of the search. (*Id.*).

Reduced to its simplest components, the court of appeals did not limit its analysis to the "business nexus" test as requested by Petitioner, but considered what the court of appeals considered to be "all of the relevant circumstances." The ruling of the court of appeals clearly reflected an analysis based upon Respondent's

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24. Pet. App. 9a, citing, *Mancusi v. Deforte*, 392 U.S. 364, 368, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968). *See also Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984): "No single factor determines whether an individual may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant."

25. [W]e find the "business nexus" test problematic in that it does not take into account any actions the individual challenging the seizure may or may not have taken to maintain privacy with respect to the item. We believe it is appropriate to consider whether an employee took steps to keep his personal property private in the workplace in determining whether the employee had a reasonable expectation of privacy in the area searched.

(Pet. App. 13a)

connection to the place seized but felt that due to the circumstances presented in this uniquely fact-bound case, additional factors were to be reviewed.[26]

Application of *Minnesota v. Carter* to the instant matter does not require a different result.[27] Unlike the criminal defendants in *Carter*, this case does not present this Court with a transient visitor to a "workplace"[28] who had only a fleeting or insubstantial connection to the office. Respondent was a corporate officer, entitled to be anywhere in the suite of offices with the exception of the office of the president of the corporation. Room 222 was located a relatively short distance from his own office.[29] At the time of his entry into the corporate offices and later Room 222, Respondent was in lawful custody and control of the office building and had the right to exclude others, especially federal law enforcement agents, from unlawfully breaking into the premises and invading the privacy haven he had established in Room 222.

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26. In *Carter*, this Court looked at the purely commercial nature of the transaction, the relatively short period of time the defendants were located on the premises, and the lack of previous connection between the defendants and the place searched.

28. The defendants in *Minnesota v. Carter* were short-term visitors to an apartment with no significant legitimate connection to the premises searched. *Carter*, *supra*, at 479. (Kennedy, J., concurring).

29. Room 222 was described as an 8 x 10 room. A floor plan of the second floor of the corporate offices admitted during the suppression hearing does not indicate the precise dimensions or distances between Room 218 [Respondent's office] and Room 222. Extrapolating the available information, however, indicates that the distance between the rooms would be approximately fifty (50) feet, including the dimensions of the conference room from which Respondent obtained the television cart and other electronic equipment.

II.

THE COURT OF APPEALS' DECISION IS RECONCILED WITH THIS COURT'S OPINION IN *MINNESOTA v. CARTER*

Petitioner argues that the court of appeals' decision is "particularly difficult" to reconcile with the reasoning of this Court's opinion of *Minnesota v. Carter*, *supra*. (Pet. Br. at 17) Respondent recognizes that the defendants in *Carter* were present in the home of a third person for approximately two and one-half hours for the sole business purpose of packaging narcotics. Those defendants were not found to enjoy a legitimate expectation of privacy in the home. The particularized facts of this case must be viewed, however, in their entirety. Respondent had a significant connection to the ADT offices and the workspace of Room 222. Unlike the defendants in *Carter*, Respondent was an employee and corporate officer of ADT and had a long-standing business relationship and connection to the company. As corporate vice president in charge of research and development, he was in charge of an important division of the corporation. Respondent had a card key which allowed him access to the building and a master key granting him lawful access into and control over all individual offices in the building except the office of corporate president.[30] Although the corporate offices consisted of two floors, Respondent entered the building on the second floor, the floor where his individual office was located. Respondent's office, Room 218, was physically located approximately fifty (50) feet away from Room 222. Although Room 222 was described as having no specified purpose, Respondent sought to use Room 222 as the location within which to place the television cart and video equipment for the purpose of viewing the video tapes which he

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30. The right of Respondent to gain access to the building during an extended holiday weekend clearly evidences Respondent's right to enter the building at his desire and will. In light of the inability of the surveilling agents to legally enter the building through any of the outer doors, it is clear that Respondent had the right to exclude others in addition to his legal possession of the premises for the time he was present.

had received. Company policy allowed Respondent access to any area of the office "[o]n a matter of need" and company policy further allowed him to be in the building for any purpose which Respondent felt was appropriate. (Tr. 13; 14) Respondent obviously felt his use of Room 222 for his personal viewing of the tapes on a Saturday morning of an extended holiday weekend and at a time when the office was closed and no other employees or third-parties were present reflects a significant connection to the premises and Room 222. The television cart and monitor were purposefully moved into that room by Respondent, the door was closed, and particularized deliberate actions were taken to ensure that no other person could intrude into the privacy haven created by Respondent as to that room. Although described as vacant, Room 222 was located within the workplace in near proximity to Respondent's own office, clearly within the confines of the corporate offices within which Respondent worked on a daily basis, and was fully operational [with electricity and lighting] allowing Respondent to operate the television and video equipment.

The distinction between Respondent and the defendants in *Carter* is obvious. As an employee and corporate officer of the corporation owning and operating the premises, Respondent had a significant connection to the workplace and Room 222 so as to be afforded Fourth Amendment protections. When asked by investigating agents why Respondent would have selected Room 222 as a location within which to view the tapes, the corporate president stated that the room was a location where Respondent would feel safe. The decision to select and utilize Room 222 as a safe haven that morning was a deliberate, conscious choice of Respondent and was based upon its convenience, locale, and utility to Respondent under the circumstances. Respondent enjoyed Fourth Amendment protection in Room 222 which was properly recognized by the court of appeals.

III.

THE COURT OF APPEALS' DECISION DOES NOT WARRANT THIS COURT'S ATTENTION

A close review of the opinion of the court of appeals reveals that its decision was in full comport with prior opinions of this Court and the decisions of other courts of appeals. If the decision in any way "parts company with a mode of analysis" (Pet. Br. at 19) employed in other cases, that situation would be the result of the court of appeals reviewing and assessing the particularized facts of the instant case. All questions of whether a defendant enjoys Fourth Amendment substantive protections must be determined on a case-by-case basis. Contrary to the argument of Petitioner, unnecessary uncertainty has not been introduced into this area of the law because the fact intensive determination of the decision limits any general application of the instant matter to other cases.[31]

In light of this Court's recent pronouncement in *Minnesota v. Carter*, *supra*, the court of appeals decision does not improperly expand the Fourth Amendment's protections in the workplace. The court of appeals simply recognized and afforded Fourth Amendment protections to an individual who had a legitimate expectation of privacy in his workplace.

As to Petitioner's argument that failure of this Court to grant the writ will result in the trier of fact in this case being deprived of relevant and reliable evidence and the search for truth at trial will be impeded, Respondent simply replies that had the agents properly conducted themselves on the day in question, that evidence would be forthcoming.[32] When this matter is finally presented to a jury,

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31. Neither Petitioner nor Respondent can provide this Court with a case "on all fours" due to the particular, unique factual fact pattern present in this case. In light of the court of appeals' proper analysis in this case, Respondent would suggest that based up that fact alone, certiorari review is unnecessary.

32. As noted by the district court, the arresting agents had several options available to them other than breaking into the building. They could

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Petitioner will be able to present to the jury the numerous child pornography files and materials obtained from Respondent's home in addition to Respondent's admission to his wife that he had been communicating on the Internet and child pornography would be found on their home computer. The truth-finding mission of the trial will not be impeded and this Court's plenary review powers need not be invoked.

CONCLUSION

The granting of the petition, vacating the judgment below, and remanding for reconsideration are unnecessary and will result in a depletion of valuable judicial resources. The petition should be denied.

Respectfully submitted,

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(Cont'd)
have applied for a search warrant, they could have waited for Respondent to exit the building and effectuate an arrest, or they could have sort permission of the corporate president to gain entry into the corporate premises. (Pet. App. 35a) The agents opted for their own course of illegal and unreasonable governmental action. The actions of the agents constituted an unlawful breaking and entering of the premises and their actions should not be condoned.